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REPORTS

OF MALAYSIAN, SINGAPORE AND BRUNEI CASES DETERMINED IN THE HIGH COURTS, THE SUPREME COURT OF MALAYSIA, THE COURT OF APPEAL AND THE COURT OF CRIMINAL APPEAL OF SINGAPORE, AND THE PRIVY COUNCIL.

SINGAPORE REPORTS

SEAH SYE KIM v. CHUA MUI YING

[O.C.J. (Grimberg J.C.) February 3, 1988]

[Singapore – Suit No. 6229 of 1985]

Land Law – Easement – Right of way – Way of necessity – Adjacent land owners – Whether there was common intention to confer right of way – Conveyancing and Law of Property Act (Cap. 68, 1970 Ed.), s. 6(1).

The plaintiff and the defendant were adjacent land owners. The present dispute involved the construction of a certain chain-link fence by the defendant across the land belonging to both the parties. The construction had adversely affected the access to and egress from the plaintiff's property. The plaintiff therefore brought the present action claiming:

(a) an easement or quasi-easement of right of way;

(b) that the conveyance by the developers to the defendand impliedly conferred a right to have and enjoy so much of the defendant's land as if that right had been expressly granted to the developers by the conveyance and that she acquired these rights; and

(c) that she was entitled to a way of necessity.

Held, dismissing the plaintiff's claim: (1) there was no express reservation of an easement or quasi-easement of right of way in favour of the developers in the conveyance to the defendant;

(2) the plaintiff was not entitled to a way of necessity;

(3) the plaintiff had failed to persuade the court of the existence of that "common intention" which is necessary to give rise to an implication of an easement of right of way over any part of the defendant's property in favour of the plaintiff.

Cases referred to:

(1) *Wheeldon* v. *Burrrows* (1879) 12 Ch.D. 31 (refd).
(2) *Union Lighterage Company* v. *London Graving Dock Company* [1900-3] All E.R. Reprint 234 (refd).
(3) *Barton* v. *Raine* (1980) 29 D.L.R.(2d) 685 (distd).
(4) *Aldridge* v. *Wright* [1929] 2 K.B. 117 (refd).
(5) *Re Webb, Sandom* v. *Webb* [1951] 2 All E.R. 131 (refd).

CIVIL SUIT.

Low Tiang Hock for the plaintiff.
Ruth Kao for the defendant.

Cur. Adv. Vult.

Grimberg J.C.: Some time prior to 1957, John Gibb and John Stott Kirkham, carrying on business in partnership under the name and style of Ideal Homes (a firm which was subsequently succeeded by Ideal Homes Ltd.), developed two residential estates in Singapore then known as Duneam Park and Whitley Park ("the estates"). I shall refer to Ideal Homes and its successor as "the developers".

The estates included a number of semi-detached houses abutting Trevose Crescent. Access to most of the lots on which the semi-detached houses were constructed was not gained directly from Trevose Crescent. Instead, the developers constructed a driveway from Trevose Crescent between pairs of certain of the lots, for the length of the two lots, until the driveway reached a dead end.

The semi-detached houses, when constructed on those lots, were situated on either side of the driveway, and had their gates more or less opposite each other, on each side of the driveway,. some distance before it reached its dead end.

A feature of the scheme was that the driveway was constructed over land owned by each of the adjacent land owners. The boundary between their respective lots ran along the driveway, from the point where it began at Trevose Crescent, past the gates of the residences on either side, until the end of the driveway. The boundary was not demarcated, either by way of a fence, or posts, or by any other obviously visible means, other than a boundary stone at either end.

The defendant, now a widow, by a deed of conveyance from the developers dated June 20,

1956 became the owner of Lot 24-287, upon which there was subsequently completed a house which became known as No. 69, Trevose Crescent ("No. 69").

By a deed of conveyance from the developers dated April 1, 1957, a Dr. Ong Kim Tin became the owner of Lot 24-286. The house built on this lot became known as No. 67, Trevose Crescent ("No. 67"), and the defendant's gate, and that of Dr. Ong Kim Tin's property were situated opposite each other, on either side of the driveway which ran the length of their respective properties, and was constructed over land which belonged to both of them.

From the time the defendant and Dr. Ong purchased their respective properties, all persons who had reason to enter the houses known as Nos. 67 and 69 did so, if they were in motor vehicles, by the only available means, that is to say, by entering the driveway from Trevose Crescent, driving along it, and then turning left or right into No. 67 or No. 69, as the case might have been. There was then, and is now, no other form of ingress to or egress from the two houses.

Dr. Ong Kim Tin died in 1966. By a deed dated April 9, 1970, the plaintiff took a conveyance of No. 67 from his wife, the executrix of his estate.

Before the plaintiff and her family entered into occupation of No. 67, they decided to construct a new fence and gate. The evidence of the plaintiff's husband, Ong Chin Thiam, was that prior to this work being undertaken, the advice of a surveyor was not sought. In the event, the new fence was constructed along a line which ran diagonally across the upper reaches of the driveway, towards the boundary stone situated at the end of it. There is no doubt, and I so find as a fact, that the line of the new fence differed from that of the old fence. To what extent is not certain, nor is the extent of the deviation important. However, as a result of the deviation, the contours of the upper end of the driveway between Nos. 67 and 69 were altered. I accept that the short broken lines on the plan (AB 201) prepared by Foong Wai Ling establish approximately the contours of the driveway as it existed when No. 67 was completed in or about 1956; and that the long broken lines on that plan indicate the present line of the plaintiff's gate and fence.

It follows that, in 1970, the plaintiff caused the gate and fence of her property to be constructed over a portion of the upper reaches of the driveway. The result was that after the work was completed, there was encompassed into the plaintiff's garden a part of what had previously been the driveway constructed over the plaintiff's land, outside her old fence. It is evident, therefore, that as far back as 1970 the plaintiff considered that she was entitled to treat the driveway up to the line of the common boundary between Nos. 67 and 69 as her own property, to do with as she wished.

The next event of any significance occurred, on the evidence called by the plaintiff, in 1975, but according to the defendant, in 1973. In my judgment, it does not matter when it occurred, or why. What happened was that the defendant caused the fence and gate of No. 69 to be re-aligned. It was a much more radical re-alignment than had been carried out by the plaintiff to her gate and fence in 1970. The defendant's re-alignment involved the construction of a chain link fence along the common boundary, from the boundary stone at the upper end of the driveway, towards Trevose Crescent. The fence was then angled back to its original line, and the defendant's gate was re-sited along the angled sector, so that the new gate no longer faced the plaintiff's gate, but faced down the driveway, towards Trevose Crescent. In the result, the defendant's fence and gate in 1973 (or 1975) took on the line shown in AB 200.

Mr. Ong Chin Thiam told me that he protested at the re-alignment on behalf of the plaintiff, both verbally and in writing, because (as was the undoubted fact and as can clearly be appreciated from AB 200), the new line of the defendant's gate and fence adversely affected access to and egress from No. 67 by motor vehicle. No longer was it possible, as it had been previously, to reverse a vehicle with facility, out of the gate of No. 67, into the upper reaches of that part of the driveway constructed over the defendant's property, and then out into Trevose Crescent.

The defendant, for her part, denied that she was the recipient of any protests, either written or oral. She disputed the authenticity of a letter dated November 25, 1975 which Mr. Ong Chin Thiam claims he wrote to her, although it is undisputed that Mr. Ong wrote to the Assistant Director of the Building Control Division on December 17, 1975, protesting the works carried out by the defendant.

Following a reminder dated January 19, 1976, by which Mr. Ong sought to ascertain whether the

re-siting of the defendant's gate and fence "is legal or constitute *(sic)* an offence", the Assistant Director of the Building Control Division responded, on January 29, 1976, in these terms:

"With reference to your letter dated January 19, 1976, please be informed that inspection showed that aforesaid gate and fencing are sited on private lot No. 24-287 belonging to House No. 69 Trevose Crescent and as such, no further action is contemplated by this Division."

In the result, the plaintiff took no further action. She says her inaction was the result of a desire to be neighbourly; the defendant rejoins that the plaintiff did nothing because she accepted that the defendant had a perfect right to do what she liked on her side of the boundary (just as the plaintiff had done in 1970).

It is evident that from about 1971 or 1972 relations between the plaintiff's family and the defendant deteriorated. There was a row between one of the plaintiff's sons and a Dutch tenant of the defendant, to whom No. 69 was then let. The defendant said that she did not go into occupation of No. 69 herself until 1978; the plaintiff's witnesses say that she was in occupation earlier, and on this issue I accept the defendant's evidence as I do her account of petty harassment and abuse on the part of members of the plaintiff's family. When matters arose which reasonable neighbours would have tended to resolve by discussion, the plaintiff and her son chose to make complaints to the police, to the Ministry of the Environment and the Dog Control Unit. Evidently, they regarded the defendant to be haughty and unapproachable – I was able to observe her closely when she gave evidence and I would not quarrel with that assessment.

In any event, by mid-June 1985, a reservoir of ill-will and spitefulness had built up on both sides of the boundary of Nos. 67 and 69. On or about June 25, 1985, the defendant embarked upon a further alteration to her fence and gate, which gave rise to these proceedings. She caused the fence at the upper reaches of the driveway (as shown in AB 200) to be extended further towards Trevose Crescent, and her gate to be re-aligned again. The result is illustrated in AB 201. There is not the slightest doubt – I inspected the houses with counsel for the parties – that the re-re-sited gate and re-re-extended fence made ingress into, and even more so egress from, No. 67 a great deal more inconvenient than it had been since 1973 or 1975 (the latter if the plaintiff's recollection is correct). The position is well illustrated by the photographs D2(9), (10), (11), (15) and (16).

Furthermore, it became apparent to the plaintiff, by reason of holes which were being dug along the common driveway towards Trevose Crescent, that the defendant intended to extend the fence along the entire driveway down to Trevose Crescent. If that intention was carried out, it would result in vehicles which had entered No. 67 having to be reversed all the way down to Trevose Crescent in order to leave the property, since there is no room to turn within the gates of No. 67.

The plaintiff, now taking the view that the driveway on both sides of the boundary constituted a common driveway, and that she was entitled to an easement of right of way over so much of it as was constructed over the defendant's property, commenced this action by writ issued on June 27, 1985. She obtained an *ex parte* interim injunction on the same day, restraining the defendant from further re-siting her fence and gate, and requiring her to set both back to the line they occupied in 1957, the year following the purchase by the defendant of No. 69, and on the plaintiff's own case, some 13 years before the plaintiff purchased No. 67.

The plaintiff puts her case in three alternative ways. Firstly, she says that there is, and was at all material times, an easement or quasi-easement of right of way over so much of the defendant's property as formed part of the driveway. The plaintiff contends that the easement or quasi-easement was expressly reserved by the developers and that it was re-granted by the defendant to the developers in the deed of conveyance of June 20, 1956, by the following words:

"... Reserving nevertheless to the original purchasers (the developers) and to all others to whom the original purchasers may grant or have already granted the same similar rights of way along over and upon the said roads ..."

that is to say, the roads built, or to be built, by the developers upon the estates.

That easement or quasi-easement, says the plaintiff, was subsequently granted by the developers to Dr. Ong Kim Tin, the plaintiff's predecessor in title, by the deed of conveyance dated April 1, 1957, in the following words:

"... hereby convey ... All the land and premises described in the first schedule hereto together with full and free right

and liberty for the sub-purchaser, his executors, administrators and assigns the owners and occupiers for the time being of the said land and premises hereby conveyed and his or their tenants, servants and all other persons for the time being authorized by them in common with the original purchasers and all persons having the like right and liberty with or without horses, cattle and other animals, carts, carriages, motor cars and other vehicles of every description at all times and for all purposes whatsoever connected with the use and enjoyment of the said land and premises hereby conveyed to pass and re-pass along over and upon the roads built or to be built by the original purchasers in or upon the said estates and providing access to the said land and premises hereby conveyed ...".

The easement or quasi-easement devolved upon the plaintiff, Dr. Ong's successor in title, by virtue of the deed of conveyance of No. 69 to the plaintiff, dated April 9, 1970, and by operation of section 6(1) of the Conveyancing and Law of Property Act (Cap. 268, 1970 Ed.) ("the Act") which is in the following terms:

"A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey with the land all buildings, erections, fixtures, hedges, ditches, fences, ways, waters, watercourses, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied or enjoyed with or reputed or known as part or parcel of or appurtenant to the land or any part thereof".

Alternatively, the plaintiff asserts that if there was no express reservation of the easement or quasi-easement, the conveyance by the developers to the defendant operated, by implication of law, to confer upon the developers a right to have and enjoy so much of the defendant's land over which the driveway was constructed, as if that right had been expressly granted to the developers by the conveyance. That same right, it was said, devolved upon Dr. Ong, and then the plaintiff, a successor in title of the developers, by virtue of the deed of conveyance to her dated April 9, 1970, and by operation of section 6(1) of the Act.

In the final alternative, the plaintiff contends that she is entitled to a way of necessity over so much of the defendant's land as forms part of the common driveway.

For her part, the defendant denies the existence of a single common driveway. She claims that the access road, to which I have referred as "the driveway", in fact comprises two adjacent driveways, one constructed on the plaintiff's property, and the other on the defendant's. The defendant says that the expression "common access roads" referred to in the conveyances means such roads as Trevose Crescent, and that the expression does not include driveways constructed within the properties abutting upon Trevose Crescent.

The defendant denies the existence of an easement or quasi-easement of right of way over her property, and asserts that no such easement or quasi-easement was reserved by the developers for the benefit of themselves or their successors in title.

The defendant further denies that the conveyance to her conferred by implication upon the developers a right to have and enjoy the use of any part of her land as if that right had been expressly granted, and she therefore denies that any such right devolved upon the plaintiff as successor in title to Dr. Ong Kim Tin.

Finally, the defendant disputes the plaintiff's claim to a way of necessity over any part of her property.

1. *Was there an express reservation of an easement of right of way?*

By the conveyance in favour of the defendant there was expressly granted an easement of right of way "over and upon the roads built or to be built by" (the developers) "in or upon the said estates" (Dunearn Park and Whitley Park) "providing access to" (No. 69 Trevose Crescent).

It is common ground that Trevose Crescent was built by the developers, and it is beyond argument that Trevose Crescent provides access to No. 69, as it does to all the other residences abutting it. Clearly, therefore, there was an express reservation of an easement of right of way in favour of the developers over Trevose Crescent.

However, Mr. Low, for the plaintiff, argued that the express reservation extended to all driveways built by the developers. He arrived at this conclusion by the following route. The developers purchased "a larger piece of land" (of which No. 69 formed part) for the purposes of developing "the said estates". Since the driveway was constructed over No. 69, and since No. 69, by definition, formed part of "the said estates", any road built over No. 69 was a road "built in or upon the said estates", within the meaning of the express reservation in the conveyance.

I am obliged to reject Mr. Low's argument, both as a matter of mixed construction and fact, and

as a matter of law. I reject the argument because it takes no account of the fact that the right of way is reserved in order to provide "access to" No. 69. It is Trevose Crescent that provides that access, and not the driveway that runs from the junction with Trevose Crescent over the property itself. There was no need for a right of way to be granted to the defendant over her own property, even if that were possible in law.

I reject the argument in law because it "is an essential characteristic of an easement that the owner of the dominant tenement and the owner of the servient tenement must be different persons. A man cannot have an easement over his own land, because all acts which he does upon his own land are acts done in respect of his rights as owner of the land, and the law does not allow the co-existence of an easement over land with the possession of the land itself" – *Halsbury's Laws of England* (4th Ed.) Vol. 14, para. 16.

Accordingly, I find that there was no express reservation of an easement or quasi-easement of right of way over No. 69 in favour of the developers in the conveyance to the defendant. It follows that the developers were in no position to grant a right of way to Dr. Ong Kim Tin, or through Dr. Ong to the plaintiff, his successor in title. The express grant which Dr. Ong took under his conveyance was a right of way over the roads in Dunearn and Whitley Estates, Trevose Crescent among them. In the result, section 6 of the Conveyancing and Law of Property Act is of no assistance to the plaintiff, because that section simply provides that a grantee acquires the rights enjoyed by the grantor at the time of the conveyance. A right of way over the driveway of No. 69 was not a right to which the developers, or Dr. Ong, were ever entitled.

2. *Is the plaintiff entitled to a way of necessity over so much of the defendant's land as forms part of her driveway?*

In the leading case of *Wheeldon* v. *Burrows*[1] the issue was whether the defendant was entitled, as of right, to light which entered certain windows of his property, and to prevent the plaintiff from obstructing those windows by building on her land, which abutted upon the defendant's land. In the course of his judgment, in the Court of Appeal, Thesiger L.J. said:

"We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean quasi-easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. Those are the general rules governing cases of this kind, but the second of those rules is subject to certain exceptions. One of those exceptions is the well-known exception which attaches to cases of what are called ways of necessity; and I do not dispute for a moment that there may be, and probably are, certain other exceptions, to which I shall refer before I close my observations upon this case."

Mr. Low argued that, if there was no express reservation within the meaning of "the second rule" referred to by Thesiger L.J., his client's case falls within an exception to that rule, in that she is entitled to a way of necessity over so much of the defendant's land as formed part of the defendant's driveway.

In my judgment, this argument does not get off the ground, and in fairness to Mr. Low, he was less than strenuous in his assertion of it. However, since the argument was advanced, I will deal with it shortly.

In *Union Lighterage Company* v. *London Graving Dock Company*[2] at p. 241, Stirling L.J. stated:

"In my opinion an easement of necessity, such as is referred to, means an easement without which the property retained cannot be used at all, and not one merely necessary to the reasonable enjoyment of that property. In *Wheeldon* v. *Burrows*[1] the lights which were the subject of decision were certainly reasonably necessary to the enjoyment of the property retained, which was a workshop, yet there was held to be no reservation of it. So here it may be that the tie-rods which pass through the plaintiffs' property are reasonably necessary to the enjoyment of the defendants' dock in its present condition but the dock is capable of use without them, and I think that there cannot be implied any reservation in respect of them."

Mr. Low was unable to put his case any higher than to say that the denial to his client of a right of way over the defendant's driveway causes his client, her family and invitees to her property manifest inconvenience in terms of access into and out of her gate. There was no suggestion that denial of the right of way resulted in her property becoming altogether inaccessible. That being so, the law will not imply a way of necessity. The matter is put

succinctly in *Halsbury's Laws of England* (4th Ed.) Vol. 14, at para. 153:

"A way of necessity is a right of way which the law implies in favour of a grantee of land over the land of the grantor, where there is no other way by which the grantee can get to the land so granted to him, or over the land of the grantee where the land retained by the grantor is landlocked. Such a way cannot exist over the land of a stranger. It is an easement without which it is impossible to make any use of the dominant tenement."

And again:

"A right of way of necessity can only exist where the implied grantee of the easement has no other means of reaching his land. If there is any other means of access to the land so granted, no matter how inconvenient, no way of necessity can arise, for the mere inconvenience of an alternative way will not of itself give rise to a way of necessity."

In the result, I find that the plaintiff is not entitled to a way of necessity over so much of the defendant's property as comprises the defendant's driveway.

3. *Do the facts bring the plaintiff's case within any other exception to "the second rule" in Wheeldon* v. *Burrows?*

Mr. Low answers "yes", very firmly to this question, and relies to a great extent on the Canadian case of *Barton* v. *Raine.*[3] That was a decision of the Court of Appeal of Ontario, and the facts are adequately set out in the headnote, which reads:

"A purchased parcel No. 1 on which a house was constructed in 1919 and he and his wife occupied it until both died in 1968. In 1941 A bought parcel No. 2, which adjoined parcel No. 1, upon which a house was built in 1924. After A purchased parcel No. 2, he let his son and daughter-in-law occupy it until 1952, when he sold it to them. They subsequently sold it in 1971 to the defendants. Since the late 1920s, a mutual driveway between the two houses had been used by the owners of both parcels to get to and from their garages, except for a few months before A's death. Four feet of the driveway was on parcel No. 1 and eight feet on parcel No. 2. A did not reserve the easement in the 1952 deed. The plaintiff, another son of A, became owner of parcel No. 1 after his parents' death. Some months after the defendants purchased parcel No. 2, a disagreement arose between the plaintiff and the defendants and the defendants then built a fence on the lot line, thereby effectively preventing the plaintiff from reaching his garage by car."

The plaintiff brought an action requiring the defendant to remove the fence, and for a declaration that he, the plaintiff, had a right to use the driveway. The trial judge held that the plaintiff was not entitled to an easement of necessity since parcel No. 1 had not become landlocked, but that he was entitled to use the driveway under the principle of an implied reservation of an easement. The defendant appealed, and on appeal, it was held, *inter alia,* dismissing the appeal, again quoting the headnote, that:

"(1) Where two parcels of adjoining land are in common ownership and share a mutual driveway, which is used by the common owner, and where the owner thereafter sells one of the parcels, he may continue to use the driveway, even though he does not reserve that right, if the parties have a common intention that it shall continue to be used by the vendor as in the past. The law implies a reservation of the easement by the grantor in such a case. On the facts of the case, the only inference that could be drawn was that the parties to the 1952 deed intended that the right of way should continue to be used as before. It was obvious to all that it was there and that it was being used by the grantor.

(2) In order to prove the existence of an implied reservation of easement on the basis of a common intention, it is not necessary to adduce affirmative evidence admitting of no alternative possibilities. Such evidence is often not available many years after the fact. The court may, from a reconstruction of the surrounding circumstances, infer that a reservation of the easement was intended by both parties."

The judgment of the Court of Appeal was delivered by Thorson J.A., and it turned largely on the extent of the "other exceptions" referred to by Thesiger L.J. in *Wheeldon* v. *Burrows.*[1] Thorson J.A., having reviewed the English cases, concluded:

"In my opinion, the learned trial judge was correct in the conclusion which he drew from the authorities referred to above, namely, that the development of the case law since *Wheeldon* v. *Burrows* has softened the rigour of the general rule set out in that case or has enlarged the scope of the exceptions to the rule. On the facts of the case at bar, I am satisfied that, although the 1952 conveyance made no mention of a right of way over the driveway between the two properties, there was, by necessary inference from the circumstances in which the conveyance was made, a common intention on the part of both the father on the one hand and the son and daughter-in-law on the other hand, after the conveyance, that each of them would continue to use the driveway in the same manner as, in fact, it had been used without interruption since the late 1920s."

I am prepared to accept, with respect, the test of common intention and I therefore ask myself whether upon the evidence before me, I am satisfied, if need be by necessary inference, that there was a common intention on the part of the developers and the defendant that there should be reserved to the developers an easement of way over the driveway of No. 69, to the extent that that easement was capable of devolving upon Dr. Ong, the purchaser of No. 67, and

thereafter upon the plaintiff by virtue of her conveyance dated April 9, 1970, and by virtue of section 6 of the Conveyancing and Law of Property Act.

I begin by observing that the facts in the case before me were at some remove from those in *Barton* v. *Raine*.[3] In the first place, there was no evidence to establish that the developers used the defendant's driveway for the purposes of gaining access to the rear of what became No. 67, whereas in *Barton's* case it was "clear that from the late 1920s, the driveway between the two properties ... was used by both property owners to get to and from the garages on their respective properties".

In the second place, there was no evidence as to user of the defendant's driveway after she took her conveyance and before the plaintiff purchased No. 67, whereas in *Barton's* case after the father sold the property next door to his son and daughter-in-law, he continued to use the driveway.

Thirdly, there did not exist a family relationship between the defendant and the developers. It was the existence of the relationship between the father, on the one hand, and the son and daughter, on the other, in *Barton's* case, which assisted the court in drawing the necessary inference that following the purchase of the property next door by the son and daughter-in-law, the father would not be obliged to obtain their permission in order to get to and from his own garage.

It is well established that there must be the clearest evidence in order for common intention to be established. Thus in *Aldridge* v. *Wright*[4] in which it was sought to establish that the facts fell within an exception to the second rule in *Wheeldon* v. *Burrows*,[1] Scrutton L.J. said, at p. 127:

"I think the grantee of No. 30, when his grantor claims to have impliedly reserved such a right from his grant, though it is not mentioned in his grant, is entitled to require the clearest evidence of an 'intention of the parties' that there should be reserved for the benefit of No. 28 an easement or quasi-easement to be used and enjoyed as of right. In my opinion the defendant has failed to show such a common intention or implied reservation in this case; the doctrine of *Wheeldon* v. *Burrows*[1] applies; the decision of the Divisional Court must be affirmed, and the appeal dismissed."

In *Re Webb, Sandom* v. *Webb*[5] which recognized that the two exceptions referred to in *Wheeldon* v. *Burrows* do not exhaust the list, nevertheless re-affirmed that the "... implication of a reservation would have to be conclusively indicated and it would not suffice if the matter remained in the sphere of conjecture or ambiguity" – see Morris L.J., at p. 147.

In the present case, not only, in my judgment, is there no evidence to establish common intention; there is positive evidence which tends to rebut its existence at the material time.

The defendant told me that, some months following the purchase by her of No. 69, she became concerned as to whether the boundary between her property and No. 67 had been correctly drawn because the culvert on her driveway seemed to be further away from her property than it should have been. This led the defendant to believe that the boundary was not correctly sited. She telephoned the developers about it, because she intended to have a fence erected along the boundary between the two properties. She received a letter from the developers dated March 6, 1957, which was the day on which she telephoned them. After assuring her that "the approach road" for the two properties was in the correct position, the letter (which was signed by Mr. Kirkham, then a director of the developers, and originally one of the two partners of Ideal Homes) went on to state:

"We understand that you are contemplating fencing along the line which *you believe* to be your boundary, and we should like to warn you that if you interfere or trespass on your neighbour's property, you may lay yourself open to a substantial claim."

The letter was headed: "Boundary between Lots 94-A and 95-B" (Nos. 67 and 69) and the emphasis is supplied by me. The letter, in my view, establishes two things. First, the clear inference arises that the defendant had said something to the developers that morning which gave rise to an apprehension on their part that she might, in the course of erecting her fence on what she conceived to be the boundary, encroach on her neighbour's property. Secondly, the letter establishes beyond any doubt that, since the boundary along which the defendant intended to erect the fence ran roughly up the centre of the area between the two properties, if it had been the developers' intention that that space was to form a common driveway, they would have warned the defendant against erecting a fence at all, and not merely enjoined her to take care that it was erected along the boundary shown on the plans.

Evidence of the developers' intention is also capable of being derived from the approved building plans. In them, the driveways of the semi-detached residences are described as "dual" driveways. That conveys to me that the developers intended the driveways to be separate, but adjacent.

The evidence also establishes to my satisfaction that the defendant, for her part, at no time considered that anyone apart from her had any rights over any part of her land. Although it is a fact that she did not proceed with the fencing that she had in mind in 1957, there were reasons for that. She was not living at No. 69 at the time. She was expecting her first child, and she was in no hurry to have the fence erected. Following the birth of her child, a daughter, she took ill and she was pre-occupied with looking after her. In October 1958 the defendant went to live in England with her husband, and returned to Singapore in 1961. Following her return, she did not live in No. 69. It was let to tenants, and she did nothing about erecting a fence until 1973 (or 1975), after the trouble occurred between her tenant and the plaintiff's family. It was then that her fence and gate were first re-sited. The defendant caused work to be carried out from time to time, both before and after she went to live in No. 69 (which she did for the first time in 1978), over and on her driveway which established, to my mind, that she never at any time contemplated the land upon which her driveway was constructed as land over which anybody but she had rights.

In the result, the plaintiff has failed to persuade me of the existence of that "common intention" which is necessary to give rise to an implication of an easement of right of way over any part of the defendant's property in favour of the plaintiff.

It follows that the plaintiff's claim must fail, and it is dismissed with costs. There will be an inquiry by the Registrar as to whether the defendant has sustained any, and if so what, damages by reason of the injunction granted by the order dated June 25, 1985 which the plaintiff ought to pay.

The result of my determination of these proceedings will be unfortunate. If the defendant proceeds with the extension of her fence along the boundary and down as far as the junction with Trevose Crescent, and all indications are that she will, those leaving Nos. 67 and 69 will be obliged to reverse their vehicles some distance into Trevose Crescent (an operation which is not without danger since Trevose Crescent is a narrow and winding road), instead of being able to execute three point turns outside the gates of Nos. 67 and 69 and driving out, front first, safely and comfortably. Alternatively, they will be obliged to reverse into the driveways from Trevose Crescent, an equally inconvenient manoeuvre.

So be it. The parties have only themselves to blame for not attempting to resolve their differences in a civilized and neighbourly manner.

Order accordingly.

Solicitors: *Low & Partners; Ruth Kao.*

EZIO PAGANETTO v. THE MANAGEMENT CORPORATION STRATA TITLE NO. 1075

[O.C.J. (Chao Hick Tin J.C.) February 2, 1988]

[Singapore – Originating Summons No. 1177 of 1987]

Land Law – Strata titles – House rules made by management corporation – Whether house rules ultra vires and void – Whether procedural rules should be strictly followed – Land Titles (Strata) Act (Cap. 158, 1985 Ed.), s. 35(4).

The plaintiff was a subsidiary proprietor of the housing estate known as Eastern Lagoon Condominium II. By the present originating summons, the plaintiff sought a declaration that a set of house rules made by the Management Corporation Strata Title No. 1075, the defendant, was *ultra vires* the Land Titles (Strata) Act (Cap. 158, 1985 Ed.) ("the Act") and accordingly the house rules were void and of no legal effect. The plaintiff further sought an injunction to restrain the defendant from enforcing the house rules on the plaintiff, his family and servants. The only ground for the plaintiff's complaint about the house rules was that they were not made by the management corporation in accordance with the procedure laid down in section 35(4) of the Act.

Held, dismissing the application: (1) on the facts it was clear that the management corporation had not in any way discharged its duties or exercised its powers unreasonably;

(2) it is also clear from sections 35(2) and 35(4) that the by-laws shall be paramount. However, there is nothing in section 35(4) which suggests that every additional rule, no matter how trivial, made by the management corporation for the orderly enjoyment of common property in the condominium must be made by way of by-laws. The discretion rests with the management corporation;

(3) it was totally unreasonable to suggest that the management corporation, in exercise of its functions and